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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

YALE BROADCASTING COMPANY, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners Yale Broadcasting Company, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Yale Broadcasting Company v. FCC,* No. 71-1780, entered on January 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B hereto), and the *per curiam* opinion of the full Court denying rehearing *en banc* (Appendix A), have not yet been officially reported. The three related opinions of the Federal Communications Commission are reported at 31 F.C.C. 2d 385 (1971) (Appendix C), 31 F.C.C. 2d 377 (1971) (Appendix D), and 28 F.C.C. 2d 409 (1971) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit (Appendix B) was entered on January 5, 1973. On April 6, 1973, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the Court of Appeals and the Federal Communications Commission correctly held that the First Amendment principle of *Smith* v. *California*, 361 U.S. 147 (1959), does not apply to the broadcast media, so that, unlike booksellers and distributors of "printed" speech, radio and television stations can be deprived of their licenses if they fail to ascertain, understand and "evaluate" the content of the recorded song lyrics they play.

2. Whether an administrative agency, after issuing policy statements that admittedly create confusion and chill protected speech, can refuse to exercise its "sound discretion," under Section 5(d) of the Administrative Procedure Act [5 U.S.C. § 554(e)], to issue a declara-

tory judgment to radio and television broadcasters who request guidance for complying with agency policy without jeopardizing their licenses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), provides:

> "The agency with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

Section 1.2 of the Federal Communications Commission's Rules, 47 C.F.R. § 1.2 (1972), provides:

> "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

STATEMENT OF THE CASE

This case involves three orders of the Federal Communications Commission which require radio and television stations to ascertain the content and meaning

of all song lyrics they play, and make a "judgment" concerning the wisdom of broadcasting songs with specific messages. Although the Commission's opinions were aimed primarily at record lyrics with "language tending to promote or glorify the use of illegal drugs" (App. E, p. 39a), they were broad enough to regulate the broadcast of all "recorded musical or spoken selections" (App. E, p. 39a).

The Commission's first order was adopted by Public Notice released *sua sponte* on March 5, 1971.[1] (See *Licensee Responsibility to Review Records Before Broadcast*, App. E, p. 39a). The notice prohibited broadcast licensees from playing musical recordings without making "reasonable" efforts to (1) listen to each recorded song or otherwise "ascertain" the "meaning" of its "words or lyrics"; (2) judge whether individual songs tended to "promote or glorify" illegal drug usage; and (3) determine whether broadcast of such lyrics served the public interest. Failure to comply with such screening procedures would jeopardize the station's license and "raise serious questions as to whether continued operation of the station is in the public interest."

Three of the six participating Commissioners stated separately that the purpose of the Notice was to induce licensees to "censor" or "eliminate" the broadcast of

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[1] The Commission did not utilize the rule making provisions contained in Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). The Notice therefore was issued without formal notice. Interested parties had no opportunity to submit advance comments for the record.

allegedly drug-oriented songs.[2] Many licensees accepted their statements as controlling.[3] Stations removed many songs from the air.[4] Records were defaced

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[2] Commissioner Robert Lee, joined by Commissioner Houser, observed: "I sincerely hope that the action of the Commission today . . . will discourage, if not eliminate, the playing of records which tend to promote and/or glorify the use of illegal drugs" (App. E, p. 40a). Commissioner Nicholas Johnson disserted, calling the Notice an "unsuccessfully disguised effort" to "censor song lyrics." He added: "Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives a loud and clear message: get those 'drug lyrics' off the air . . . or you may have trouble at license renewal time" (App. E, p. 42a). Commissioner H. Rex Lee concurred, stating his regret that the Notice did not apply to all programming (App. E, p. 40a). Commissioner Houser also concurred, warning that the broadcast industry might be contributing "to the drug problem" (App. E, p. 41a).

[3] Several licensees in a Virginia survey described their reactions: "If there is a mention of drugs in a record, it is off because of this ruling—any drug lyrics and it goes . . . . [I]f it's not clear, or it's marginal, then we've got to protect ourselves and we won't play the song" (J.A. 164). ("J.A." references are to the Joint Appendix filed with the Court of Appeals below. A certified copy has been lodged with the Clerk of this Court.) "[T]he FCC is saying, 'Even though this isn't a regulation, you had better watch yourself, because we will ask you questions about it [songs with drug references] next time your license comes up for renewal'" (J.A. 166-67). "[W]hy hassle it—other songs are available and we will make the same money without playing drug songs . . . . License renewal comes up in 1972, and everybody is holding their breath" (J.A. 167). Many similar reactions appear at J.A. 158-78.

[4] Stations banned many well-known songs, including "Puff the Magic Dragon" (Peter, Paul & Mary), "Lucy in the Sky With Diamonds" (Beatles), "With a Little Help From My Friends" (Beatles), "Mr. Tambourine Man" (Bob Dylan), and "White Rabbit" (Jefferson Airplane) (J.A. 169-76). One licensee banned all Bob Dylan records because it "could not interpret the lyrics" (J.A. 148). Records thought to be drug-related were put on "Do Not Play" lists (J.A. 87-88, 147-48).

to prevent accidental broadcast (J.A. 195[4a]). "Do Not Play" lists of forbidden songs were circulated through stations (J.A. 87-88, 147-48). Announcers were fired for playing songs with suspected drug connotations, or for failing to pre-screen their selections (J.A. 88-89, 148).

Petitioners herein asked the Commission to reconsider and withdraw its Notice on constitutional and statutory grounds.[5] Petitioners, who represent various interests, are the college radio stations of Yale University and the University of the Pacific (California), a national drug abuse council, three announcers fired by management for playing records deemed banned by the Commission, several announcers who felt intimidated in their selection of records, and various listeners of stations that had removed specific records from the air.[6]

The Commission denied the petitions for reconsideration on April 16, 1971 (App. D, p. 33a). While it addressed the issues raised in "greater detail," its

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[4a] "J.A." refers to the Joint Appendix in the Court below which the parties have lodged with the Clerk of this Court.

[5] Petitioners argued, *inter alia*, that the Commission had impermissibly induced broadcast licensees to self-censor protected speech, had subjected the broadcast of protected songs to unconstitutional "prior restraints," had violated the no-censorship ban in Section 326 of the Communications Act, 47 U.S.C. § 326 (1970), and had acted without the notice and procedural safeguards for rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553 (1970). (See J.A. 22-67)

[6] Petitioners are Yale Broadcasting Company (WYBC-FM, New Haven, Conn.), University of the Pacific (KUOP-FM, Stockton, Calif.), National Co-ordinating Council on Drug Abuse, Inc., Steve Leon, John Gorman and Kenneth Currier (discharged announcers), Charles Laquidara, Stuart Jackson and James Irwin (announcers and station managers), and Mark Gorbulew and Sara Vass (Washington, D.C., residents and listeners).

opinion and order "adhere[d] fully" to the policy stated in its first Notice:

> " 'Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics' " (App. D, p. 33a; see App. E, p. 39a).

The Commission also clarified its earlier Notice in two respects.

First, it conceded that songs referring to drugs are protected speech and immune from direct censorship by the Commission (App. D, p. 34a).[7] Stating that a licensee is "not a book store" (App. D, p. 36a), however, the Commission reminded stations that they must still know the "content" of the records they played. Stations, in other words, might play any song they wished. But they could lose their licenses if they did so without knowing the "meaning" of the lyrics, and without deciding whether those songs served the public interest.

Second, the Commission stated that a licensee's attempts to acquire knowledge of a record's content need not be "extensive"—merely "reasonable" (App. D, p. 36a). Licensees, the Commission suggested, could acquire the requisite knowledge by pre-screening each record before airplay, by instructing announcers to

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[7] Although Chairman Burch concurred in this conclusion, he later indicated to Senator Nelson that he would "vote to take the license away" from any station playing songs that promoted the use of drugs." (App. A, p. 5a).

bring records they had played "once" to a "responsible management official" for final screening, or by screening records named in listeners' complaints (App. D, pp. 35a-36a). Although individual records were not banned, a licensee failing to make "reasonable" attempts at learning their content would still lose its license.[8]

Despite this second opinion, uncertainty remained in the broadcast industry.[9] Petitioners accordingly requested the Commission to reconsider and clarify its opinion in certain respects, and withdraw it in others. In addition, petitioner Yale Broadcasting Company drafted compliance guidelines of its own in the form of a proposed "Station Policy Concerning the Broadcast of Musical Recordings" (see App. C, p. 30a). Yale asked the Commission to provide it with a declaratory order stating whether its proposed "Policy" would comply with the Commission's song lyric procedures,

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[8] Commissioner Wells concurred in the Commission's opinion, but stated somewhat contradictorily that evaluating the content of record lyrics was "an impossible assignment" (App. D, p. 38a). Commissioner Bartley concurred, but only to the extent that the Commission's opinion "return[ed] to the situation prior to release of the Public Notice of March 5, 1971" (App. D, p. 38a). Commissioner Johnson again dissented.

[9] Several licensees remarked: "What they are saying and what they mean are two different things—they meant to tell broadcasters what not to play" (J.A. 338). "They say that they now won't take away your license, but also say don't play pro-drug records—it makes no sense at all. I'm going by the first one [the Public Notice of March 5th]" (J.A. 339). "[T]he order says you can't be prosecuted for playing drug-oriented songs, but yet you must know what you are playing. This requires me to know the lyrics of every song I play, which is absurd, because you just can't hear or understand some of the lyrics of some songs .... I feel the whole thing could turn into a witch-hunt" (J.A. 343). Further similar comments appear at J.A. 336-46.

or whether, if implemented, it would jeopardize Yale's license.[10] Yale's "Policy" expressed awareness of the drug problem, but proposed to deal with it in public service and news programming. In this manner, Yale hoped to retain its freedom to select records for broadcast on the basis of their artistic merit, and not the meanings of specific lyrics. Yale contended that the uncertainty surrounding the Commission's prior rulings should impel the Commission to give it guidance by ruling on its proposed programming "Policy."

The Commission denied all of petitioners' requests in a third opinion on August 18, 1971 (App. C, p. 27a). It described its ascertainment policies as "amply clear" and refused to clarify or withdraw its earlier opinions. The Commission also refused to issue a declaratory order on the validity of Yale's proposed programming "Policy," finding it "abstract" and "not fleshed out by the licensee's actual operation." "In this delicate area," the Commission concluded, "we think it preferable to avoid unnecessary rulings" (App. C, p. 28a).

Commissioner Johnson again dissented. He called the Commission's policies "so vague and overbroad as to continue to be impermissible under the First Amendment," and urged the Commission to "issue a clear and unequivocal repudiation and withdrawal of our March 5 and April 16, 1971 Policy Statement" (App. C, pp. 28a, 30a). Only in this manner could the "chilling

[10] Yale Broadcasting Company invoked Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2 (1972), to request the declaratory ruling. Section 1.2 of the Commission's Rules simply authorizes the Commission to issue declaratory rulings in a manner consistent with Section 5(d) of the APA.

effect" on freedom of broadcast speech be partially repaired.[11]

On a petition for review to the Court of Appeals for the District of Columbia Circuit, petitioners urged two basic grounds for reversal. First, they argued that this Court's opinion in *Smith* v. *California*, 361 U.S. 147 (1959), prevented the Commission from placing on broadcast licensees the procedural burden of examining every record they played for content, meaning, and merit. To do so would curtail the diversity and quality of musical expression available to the public. Second, petitioners argued that the Commission abused its "sound discretion" under Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e) (1970), by refusing to grant Yale Broadcasting Company's request for a declaratory order. Without a declaratory ruling, Yale would be forced either to abandon its proposed "Policy" for broadcasting songs, to the detri-

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[11] Commissioner Johnson observed:

"[W]hen the President of the company (or . . . the Chairman of the FCC) shouts at us and tells us to stop what we're doing it takes an unusually strong (or foolish) person to go on speaking or performing as before—however deeply he feels about it. No matter how urgently we are subsequently assured that all is forgiven and that we are encouraged to 'speak our minds' (or . . . that the FCC doesn't really mean to ban records) we have already been psychologically inhibited. The First Amendment damage has already been done.

* * * *

". . . Broadcasters—courageous and cowardly alike—are a pretty skittish lot . . . . Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please. At that point the government has succeeded in its purpose; it is then safe to issue all the apologies and rescinding statements necessary to silence the critics" (App. C, pp. 29a, 30a).

ments of its First Amendment rights, or proceed at its peril and possibly risk its license at renewal time.[12]

The Court rejected both arguments in an opinion noticeably hostile to contemporary popular songs.[13] The Court dismissed *Smith* v. *California, supra,* by stating that broadcasters needed to screen fewer records than booksellers books, and that broadcasters could not make judgments about the "wisdom" or "value" of the music they aired without understanding the words and meanings of individual songs (App. B, p. 17a). The Court affirmed the Commission's refusal to issue a declaratory order, viewing its decision as an exercise of "sound discretion." The Court did not require the Commission to make any specific showing that First Amendment speech values were unimpaired by its inaction. It stated that Commission refusals

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[12] The petitioners also urged the Court to reverse the Commission on a third ground, namely that the Commission's policy on song lyrics was such a substantial departure from past rulings, that it could only be promulgated through the rule-making procedures of Section 4 of the APA, 5 U.S.C. § 553 (1970). The Court explicitly rejected the argument. While the petitioners do not present the argument as an independent ground for granting certiorari, they reserve the right to advance it as a ground for reversal should certiorari be granted.

[13] Lyrics were described as "completely meaningless gibberish" that "approach the equivalent of machinery operating or the din or traffic" (App. B, p. 18a). "At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate" (citing the Noise Control Act of 1972) (App. B, p. 18a). The Court analogized "canned" recorded music to "pork and beans" in a can on a grocery shelf (App. B, p. 19a), and described songs as "the banal observations of a moon-struck adolescent" or "two enraged alley cats fighting in a garbage can" (App. B, pp. 22a-23a).

to issue declaratory orders would be reversed only for a "clear abuse of discretion," and implied that agency discretion in this area was substantial, if not complete.

The full Court of Appeals denied a motion for rehearing *en banc* initiated by Chief Judge Bazelon (App. A, p. 1a). Chief Judge Bazelon dissented in a separate statement, arguing that the case presented unresolved "questions of considerable significance" (App. A, pp. 7a-8a).

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED A MAJOR QUESTION CONCERNING THE FIRST AMENDMENT RIGHTS OF BROADCASTERS THAT CONFLICTS WITH A PRIOR DECISION OF THIS COURT

The decision below undercuts this Court's opinion in *Smith v. California, supra,* and renders it inapplicable to the most important media of communication today. The Court of Appeals has ruled that the Government may impose procedural burdens on the First Amendment activities of broadcasters that could not be imposed on booksellers. This Court in the past has scrutinized prior restraints on speech with strict care. It has sustained slight procedural burdens in the area of broadcast speech, but only where they are clearly designed to *increase* the overall diversity of views available to the public.[14] In a major departure, the decision below imposes substantial burdens on protected broadcast speech which will only result

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[14] *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 389-92 (1969) (potential "chilling effect" of fairness doctrine procedures outweighed by countervailing increase in diversity of views); *see generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 920 (1970).

in restricting rather than diversifying the public's access to protected speech.[15]

In *Smith v. California, supra,* this Court struck down a California law making it a crime for a bookseller to possess an obscene book without knowledge of its contents. The Court reasoned that such a law would force booksellers to play it safe and sell only those books they had read. By reducing the number and variety of books sold, the "public's access to [protected] reading matter would be restricted." *Smith* v. *California, supra,* at 154.[16]

If California, instead, had made it a crime merely to sell any *unread* book—whether obscene or not—a similar restraint would have been placed on printed speech. Book stores could only sell the books they had read. Yet the Court of Appeals below has imposed precisely this requirement on broadcast licensees. Stations can now only play records they have "read."

Indeed, the Court of Appeals' decision is significantly more restrictive than the California statute in *Smith.* There, booksellers could at least risk selling

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[15] Unlike the "obscene" books in *Smith* v. *California, supra,* the broadcast speech here in question is not "illegal." The Commission therefore has no legitimate interest in *suppressing* songs with drug implications, and its policies cannot be sustained on that rationale alone. *See generally, Bradenburg* v. *Ohio,* 395 U.S. 444, 449 (1969) ("mere advocacy" of illegal conduct is protected speech); *Kingsley Int. Pictures Corp.* v. *Regents,* 360 U.S. 684, 688-689 (1959) (invalidating "desirable, acceptable, or proper" as a statutory standard for suppressing speech).

[16] "For if the bookseller is criminally liable without knowledge of the contents [of his books], . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . ." *Smith* v. *California, supra,* at 153.

books from obviously "safe" categories—cooking, travel, children, adventure—without having to read them. They could quickly familiarize themselves with the content from the cover, illustrations, publisher, or book reviews. Booksellers would be forced actually to read only books from "potentially risky" categories. Under the Court of Appeals' decision, however, there are no "safe" categories. Licensees must make efforts to ascertain the meaning and content of *all* records they play.[17] And they can only do that by *listening* to each record.[18] Unlike a book, a record cannot be skimmed; each forty-five minute album takes forty-five minutes to "read." The public's right to hear will be measured by the licensee's ability to digest the record lyrics in his library.[19]

The Court's decision below is more restrictive than *Smith* in one additional respect. There, booksellers could only be punished for distributing *unprotected* ("obscene") speech. Here, however, broadcast licensees can be punished for broadcasting *protected*

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[17] It should be noted that the Court of Appeals viewed the Commission's policies as mandatory, not discretionary: "[W]e conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities" (App. B, p. 19a).

[18] Record lyric texts are rarely available and occasionally erroneous or unreliable (J.A. 108).

[19] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964), also struck down analogous restrictions on printed speech. This Court held that the procedural burden of checking all controversial statements for "truth" would deter newspapers from covering many controversial stories. The difficulty of screening records for meaning and content is equally burdensome. *See Washington Post Co.* v. *Keogh*, 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

speech—song lyrics—that they failed to "read" or screen.

The Court of Appeals seeks to avoid the logic of *Smith, supra,* by postulating differences between broadcast stations and book stores. It suggests, for example, that a screening burden is less for broadcast stations because they only need to screen the song lyrics actually broadcast (App. B, pp. 16a-17a). This suggestion is factually contradicted by the record below (J.A. 43), however, and overlooks the fact that the records eventually broadcast must be culled from literally thousands of other available albums.[20]

The Court of Appeals also states that broadcasters, unlike book stores, must make judgments concerning the "wisdom" or "value" of their programming, and can do this only by knowing the "content" of that programming (App. B, p. 17a). This statement mistakenly assumes, however, that the "wisdom" or "value" of contemporary songs can be judged by their words alone. Quite the contrary, the words and music of popular songs, like poetry, are an esthetic whole, unifying thought and expression.[21] Broadcast licensees must be able to select and broadcast music on the basis of its overall artistic qual-

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[20] Some stations have over 7,000 record albums in their libraries, each playing 30 to 40 minutes (J.A. 43). Petitioner Yale Broadcasting Company, with 5,000 albums, would need 2,500 hours just to screen them once (J.A. 70). Moreover, many stations receive over 200 new albums each week (J.A. 70). Although petitioners submitted these figures to the Court of Appeals below, the Court did not discuss them.

[21] "A song, after all, is not a speech. Like any work of art, it bounces back different meanings to different people at different times, as life shines new light on it." P. Seeger, *When the Mode of the Music Changes,* 1 (1971).

ity. The Court of Appeals has improperly forced licensees to single out and inspect song lyrics alone. Without discussion, the opinion below has relegated the nonverbal portion of contemporary music to an inferior and less protected status. Whether a "popular song is a constitutionally protected form of speech" (Bazelon, C.J., App. A, p. 8a), however, is a question of substantial importance, and should be resolved in the first instance by this Court.

The opinion below also misconstrues the seriousness of the burden entailed in ascertaining the meaning and content of contemporary song lyrics. In many instances the lyrics are difficult to hear (J.A. 107-12). Music may drown out entire words and phrases. The lyrics are often chimerical, ambiguous and difficult to understand. Experienced announcers may require hours to decipher the words of one song (J.A. 107-14). Mistakes of interpretation or unjustified doubts may induce licensees to remove ambiguous but musically important songs.[22] In short, as Chief Justice (then Judge) Burger has observed, a requirement that licensees ascertain the content of programming "'is simply a euphemism for censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments.'" *Anti-Defamation League of B'nai B'rith* v. *FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

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[22] Licensees, for example, have banned the Beatles' satire on American violence, "Happiness is a Warm Gun," fearing it might advocate the "injection of heroin" (J.A. 110-11). Many experienced announcers have attested that they cannot tell conclusively what many song lyrics signify, or whether a particular message "promotes or glorifies" illegal drugs (J.A. 76-78, 86-87, 109-110, 114, 180-93).

II. THE DECISION BELOW IS IN CONFLICT WITH AN IMPORTANT DECISION OF THE SECOND CIRCUIT

The opinion below upheld the Commission's refusal to issue a declaratory order on the acceptability of Yale Broadcasting Company's proposed "Policy" for compliance with the Commission's song lyrics statements. In so doing, it failed to acknowledge a conflicting decision from the Second Circuit, ignored the legislative history to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), and forced Yale into an untenable dilemma—either abandon its proposed programming "Policy," or risk the loss of its license at renewal. This Court should resolve the conflict among the Circuits concerning the extent to which administrative agencies can refuse to issue declaratory orders eliminating uncertainty in the First Amendment area.

Section 5(d) of the Administrative Procedure Act provides that an administrative agency, "in its *sound discretion,* may issue a declaratory order to terminate a controversy or remove uncertainty" (emphasis supplied). Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2 (1972), authorizes the Commission to issue "declaratory rulings" pursuant to Section 5(d).

Relying on Sections 5(d) and 1.2, Yale Broadcasting Company asked the Commission to issue a declaratory order stating whether its proposed "Policy" for broadcasting records complied with the Commission's prior statements. Yale's "Policy" (see App. C, p. 30a) assumes *a priori* that some records aired on the station will inevitably contain words or lyrics with possible drug connotations.[23] Instead of instructing its an-

[23] It is difficult to imagine a popular song without some words that could not be stretched into drug references. In 1932, people

nouncers to review and possibly remove such records from the air, Yale proposed to broadcast separate anti-drug messages in the nature of public service and news announcements. Yale hoped to ameliorate the problems of drug abuse without reviewing the lyrics of individual songs.

The Commission refused to issue a declaratory ruling, finding it "preferable to avoid unnecessary rulings" in a "delicate" area "not fleshed out by the licensee's actual operation" (App. C, p. 28a). The Court of Appeals affirmed, stating that "critical facts" were missing from Yale's request, that "subsequent events" might alter them, and that no "clear abuse of discretion" was found in the denial of Yale's request.[24]

The Court's opinion below is in direct conflict with a recent decision of the Second Circuit. In *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). several broadcasters asked the Commission, pursuant to Section 5(d), to issue a declaratory ruling stating whether a list of proposed programs would violate the broadcast ban on information concerning "lotteries."[25] The Commission refused to rule on some of the proposals, stating it was "clearly not

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sang: "Every kiss, every hug seems to act just like a drug. You're getting to be a habit with me . . . . I'm addicted to your charms." In 1934 Cole Porter wrote: "Some they may go for cocaine. I'm sure that if I took even one sniff, it would bore me terrifically, too. I get a kick out of you." Many contemporary songs extoll "legal" drugs such as alcohol and nicotine (see App. C, p. 43a).

[24] Because Yale's "Policy" only proposed to adopt operating *procedures*, there were no "critical facts" or "subsequent events" that might have affected its implementation.

[25] See 18 U.S.C. § 1304 (1970) (Communications Act).

practical to attempt to rule on all of the various materials submitted by the parties in the absence of a particular factual situation."

The Second Circuit reversed. It ordered the Commission to rule on all of petitioners' proposals:

> "Petitioners complain about the order's lack of specificity as well as the Commission's failure to rule on a number of the requests made to it.... We think these concerns are to some extent justified. There have apparently never been any prosecutions for violations of Section 1304 ['lotteries'], and we find no other judicial opinions explicitly interpreting the 'information concerning' language of the statute. In view of this, and *because of the great interest broadcasters have in not jeopardizing their licenses,* we believe that the proper course is to set aside the Commission's declaratory ruling to allow it to reconsider petitioner's request in light of this opinion." *Id.* at 997-98 (emphasis supplied).

The controlling facts in the Second Circuit's opinion are virtually identical to those in the Court's opinion below. In each case the Commission's rulings lacked specificity and had generated substantial confusion.[26] Here, as in *New York State Broadcasters,* the Commission had issued no complaints, license revocations or other adjudicatory rulings containing guidelines for compliance with its orders. Like the petitioners in *New York State Broadcasters,* Yale Broadcasting Com-

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[26] The Commission itself commented that its first Notice was "widely" and "erroneously depicted" in the press (App. D, pp. 33a-34a). The Commissioners themselves could not agree on the meaning of their actions and issued numerous concurring and dissenting opinions. The detailed evidentiary materials submitted by petitioners document this confusion (J.A. 69-204, 333-46).

pany expressly asked the Commission for a declaratory order to avoid "jeopardizing" its license at renewal. In both cases the Commission's refusal to rule left a residual chill on protected speech.

The District of Columbia and Second Circuits have split over the proper standard for reviewing an agency's refusal to clarify its policies in the First Amendment area.[27] The Second Circuit will not defer to Commission discretion where the Commission itself has caused uncertainty, lacks guiding precedents, and suggests that improper conduct might cost the broadcaster its license. Under identical circumstances, the District of Columbia Circuit will defer to any agency action short of a "clear abuse of discretion" (App. B, p. 25). The Second Circuit, in short, has construed "sound discretion" under Section 5(d) to hold the Commission to a higher standard of judicial review, and a greater burden of proof, where its licensees' First Amendment rights are involved.

It also seems apparent that the Court's opinion below conflicts with Congressional intent in enacting Section 5(d). Legislative history demonstrates that Congress intended to give persons a right to obtain declaratory

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[27] This conflict is aggravated by the fact that three older Circuit Court rulings suggest that an agency's refusal to issue a declaratory ruling is completely discretionary and unreviewable altogether. See *W. J. Dillner Transfer Co.* v. *McAndrew*, 226 F. Supp. 860 (W.D. Pa. 1963), *aff'd*, 328 F.2d 601 (3rd Cir. 1964) (*per curiam*); *Continental Oil Co.* v. *FPC*, 285 F.2d 527 (5th Cir. 1961); *United Gas Pipeline Co.* v. *FPC*, 203 F.2d 78 (5th Cir. 1953). These cases, however, did not involve First Amendment issues, and seem clearly incorrect in light of clear legislative history. See, *e.g.*, Senate Judiciary Committee, *Committee Print*, Sen. Doc. No. 248, 79th Cong., 2d Sess. p. 25 (1946), and discussion *infra*.

relief from administrative agencies to determine the consequences of their proposed action, "without the necessity of any party's acting at his peril upon his own view . . . ."[28] While Congress evidently envisioned some agency discretion, it required that this discretion be "sound" and reviewable in the federal courts.[29] The issuance of administrative declaratory orders were to be governed by the same principles that governed the issuance of declaratory judgments in the courts.[30] The scope of permissible discretion was to turn on the facts of each individual case. By withholding a ruling on Yale's proposed "Policy" in the instant case, the Court below has deprived petitioners of the guidance anticipated by the drafters of Section 5(d) of the Administrative Procedure Act.

The Court's opinion also conflicts with First Amendment principles underlying decisions of this Court. Just as ordinary burdens of proof are shifted in First Amendment areas, see *Speiser* v. *Randall*, 357 U.S. 513 (1958), and administrative procedures are adjusted to accommodate important speech interests, see *Freedman* v. *Maryland*, 380 U.S. 51 (1965), so, here, the ordinary scope of agency discretion must reflect the First Amendment rights of licensees regulated by an administrative agency. Where economic interests are involved, of course, a reviewing Court may be justified in affirming agency action that falls short of a "clear

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[28] *Administrative Procedures in Government Agencies, Report of the Committee on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 30 (1941).

[29] "[T]he phrase 'sound discretion' means a reviewable discretion and will prevent agencies from either giving improvident declaratory orders *or arbitrarily withholding such orders in proper cases.*" (Senate Judiciary Committee, *Committee Print*, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 25 (1946) (emphasis supplied).

[30] See *Committee Print, supra*, at 204, 263, 362.

abuse of discretion." But where First Amendment interests are at stake, the standard of review must be substantially narrower.[31] Non-judicial administrative agencies must be given far less discretion to impinge on protected First Amendment activities than the Court has tolerated below.[32]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[31] Cf. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 *note* 4 (1938).

[32] Some commentators have further argued that the First Amendment requires the courts to provide applicants with declaratory judgments whenever they are uncertain whether their proposed speech activities involve protected or unprotected speech. See H. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Whatever the force of this argument, Congress has already provided for such declaratory relief before administrative agencies under Section 5(d) of the Administrative Procedure Act.